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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

CENTRAL JERSEY INDUSTRIES, INC.
a corporation of the State of New Jersey, *et al.*,
Appellants,

v.

THE UNITED STATES RAILWAY ASSOCIATION AND THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEALS FROM THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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The Government Parties in their Motion to Affirm seek to foreclose appellants [1] (CNJ) from any serious appellate review of the judgment of the trial court below, stressing the limited precedential value of a summary affirmance.[2] It is not surprising that the Government takes this tact. This is the only case ever to have

1. The listing required by Rule 28.1 is included in our Jurisdictional Statement (J.S.) ii.

2. While not possessing the precedential value of an opinion of this Court after plenary hearing, summary affirmance would have precedential value beyond simply rejecting CNJ's claim for a larger award.

adopted junk value as a measure of the just compensation payable for operating facilities taken for continued use. It is the first case to have held that the Government may deliver its IOU as just compensation for the taking, even though the market value of the IOU when delivered was 15% less than the value found by the Court for the assets taken. It presents the only modern instance in which a court has determined that the intensity of the public need for the assets taken justifies adherence to a prospective legislative determination of delay compensation, despite the fact that it proved to be substantially below interest rates prevailing during the period of delay on all forms of conservative investments.

These are extraordinary rulings; but the Government cloaks their significance by oversimplifying the proceedings at the trial level and the issues arising therefrom. We respond below to the Government's presentation. Our principal contention, however, is that the Special Court has broken new and dangerous ground in the law of just compensation. Its conclusions are of great importance to the development of the law and to the thousands of unpaid creditors of the CNJ estate.[3] They deserve plenary appellate review; and Congress contemplated in § 303(d) of the Rail Act that such review would be by the Supreme Court.

1. *The Valuation Standard*—The Government presents a two-pronged approach to the issue of the valuation standard.

Mandel v. *Bradley*, 432 U.S. 173 (1977), relied upon by the Government and cases cited therein, only cautioned that summary affirmance is not to be viewed as "breaking new ground" in the sense of renouncing doctrines previously adopted by this Court after full argument. *Id.* at 176. However, the issues presented herein for the most part, if not entirely, have not yet been passed upon by this Court. *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173 (1979), also cited by the Government, recognizes that summary affirmance does have precedential value, although less than a full opinion after plenary hearing. *Id.* at 180. See also *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 499 (1981). In this case, the precedential weight of this Court's summary affirmance would probably be more than in most, considering the great eminence of the panel below.

3. CNJ is the only transferor estate that has been unable to pay its unrelated creditors in full.

First, it contends that the Special Court simply acted under traditional principles and found the fair market value of the assets. This is not so for the reasons set forth at pages 23 through 25 of the Jurisdictional Statement which the Government has not addressed. The Special Court rejected the market evidence as to how potential rail use purchasers valued the assets and what they were prepared to pay for them, finding that "the minds of all concerned in 1974 were attuned to a higher scale", *CNJ Opinion,*[4] 571 F. Supp. 1269 at 1284 (Regional Rail Reorg. Ct. 1983) (CA 689), than that considered appropriate by the Court; and it also declined to find the scrap value of the assets in the real world markets as they existed on April 1, 1976. The traditional fair market value tests would be based upon a factual inquiry into the existing market factors at the pertinent time as well as the methodologies employed and valuations reached by the distinguished appraisers (some of whom were to become Government experts in this case) who had studied the value of CNJ's rail assets in non-litigation contexts. However, the Special Court put all of this aside in favor of the creation of its own judicial scrap model which priced CNJ's transferred assets under forced sale conditions in markets hypothetically glutted by the assets of all other transferors, who were presumed to be involved in a simultaneous liquidation. No one has ever explained how such a model, which posits as its basic assumption a circumstance in which all transferors are scrambling to sell their properties at the same time, comports with the uncompelled willing buyer/willing seller concept which is at the heart of the fair market rule, *Kirby Forest Industries, Inc.* v. *U.S.*, ____ U.S. ____, 52 U.S.L.W. 4607, 4610 (U.S. May 21, 1984); and no one has ever explained how the CNJ could be a willing seller at a $42.5 million level when everyone involved was aware of the much higher results reflected in all the scrap value studies done by 1974, the time at which, the Court found, the sales price would have been agreed upon. *Rail Use Opinion,* 531 F. Supp. 1191 at 1311 (CA-466). The Special

4. We have continued to follow the convention used by the Court below and in our prior submission of referring to the opinions of the Special Court in this case by an abbreviated form of citation.

Court did not apply the traditional fair market value rule; for if it had, CNJ would not have raised a valuation issue on appeal.

The Government's second approach to the valuation issue is to contend that net scrap values are a proper constitutional measurement where the properties lack earning power, adding the gratuitous observation that CNJ was never serious in its contentions about earning power or the value of its properties to private parties.[5] However, the trials that were scheduled pursuant to the Second and the Sixth Pretrial Orders (CA-900) were directed at establishing what would have been received from hypothetical dispositions occurring in the absence of the Rail Act if all transferors sought to dispose of their properties at the same time and not at establishing the earning power *vel non* of the properties. Under those circumstances set by the Court, CNJ contended that the State of New Jersey would have been the purchaser of last resort of its rail assets and relied upon the evidence of its actual negotiations with the State and the studies that the State had done of the railroad to establish the price that would have been paid. We disagree with the Government's contention that scrap value is a proper constitutional measure where the property lacks earning power. (See J. S., 19-22). The only authority to support the Government's position on this issue is the Opinion of the Special Court below.[6] All of the other authorities, as well as the commentators, are of a contrary view. (J. S., 22). The issue is

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5. The gratuitous observation is not fair; for CNJ did submit evidence regarding the potential earning power of its properties as well as the interest of other private parties in them. The former was unrebutted and never evaluated by the Court. The latter, including the Chessie's negotiations for the lease of the CNJ, were taken note of by the Special Court. (See J.S., 5).

6. *Chicago & Northwestern Transportation Co.* v. *U.S.*, 678 F.2d 665 (7th Cir. 1982) does not support the Government position. The question in that case, described therein as one of "first impression under the 1980 Staggers Rail Act", involved the meaning of the term "fair market value" as applied to an abandoned rail line. 678 F.2d at 666. There was no taking but rather an effort by the railroad to obtain ICC approval of a price for an abandoned line greater than that which certain localities seeking to preserve commuter service were willing to pay. In upholding a price based on estimated "salvage value", identified as "fair market value" for nonrail use, the Court conceded that the result might be "harsh". *Id.* at 670. Whatever the merit of that holding, the rail

one of substantial importance which should be fully considered and resolved by this Court.

2. *The Form Of The Compensation And Delay Damages*—Contrary to the Government's assertion (Motion, 21), CNJ does dispute the constitutional sufficiency of the form of the compensation. CNJ contends that it is improper to deliver a Government debt obligation, instead of cash, as just compensation—particularly where the obligation is not payable until 3 ½ years after the entry of final judgment and where it accrues interest at a rate so low that the fair market value of the obligation when delivered is 15% less than its face value. The Government, contending that this is a settled question, cites the Special Court's *CMV Opinion*, 445 F. Supp. at 999 (Regional Rail Reorg. Ct. 1977) and this Court's Opinion in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 155 (1974). The issue involved there, however, was whether the Fifth Amendment requires payment in cash and not the sufficiency of a Government note of discounted value; and on the question of cash this Court specifically reserved decision. *Id.* at 151-52. Other courts have held, contrary to the Special Court, that cash was required. (See J. S., 26-27). As indicated earlier, this, as well as the specific form of payment used here, raise important questions of broad public significance which warrant full review by this Court.

As noted, the question of the proper amount of interest to which CNJ is entitled for the delay in payment for its properties is certainly one of broad public interest, affecting not only the ultimate recovery in this case but all federal and state takings in situations where payment has been delayed. The ruling below, in limiting interest for the entire period of the delay to that which could have been obtained on long-term Government bonds at the time of the taking, notwithstanding the great increases in interest rates during the extended period of delay, conflicts with rulings of other lower federal courts. More importantly, it contravenes a basic principle laid down many times by this Court that the former owner is entitled to interest in an amount sufficient to

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properties here had not been abandoned but rather taken by the Government for continued operation.

place him in as good a position monetarily as he would have been had the payment coincided with the appropriation. *Seaboard Air Line Ry.* v. *U. S.*, 261 U.S. 299, 306 (1923); *U. S.* v. *Miller*, 317 U.S. 369, 373 (1943): *Kirby Forest Industries, Inc.* v. *U.S.*, ____*U. S.* ____, 52 U.S.L.W. 4607, 4610 (U.S. May 21, 1984). In conformity with this principle, other federal lower courts have held that the former owner's interest entitlement must be measured by the rates prevailing on suitable investments between the date of taking and the date of payment, representing investment opportunities available had the former owner received payment at the time of the taking. See, *e.g.*, *Georgia Pacific Corp.* v. *U.S.*, 640 F.2d 328, 365 (Ct. Cl. 1980); *Miller* v. *U.S.*, 620 F.2d 812, 838-39 (Ct. Cl. 1980); *U. S.* v. *97.19 Acres*, 511 F. Supp. 565, 569 (D. Md. 1981). The thesis of the Special Court that the varying rates during the delay period could not be considered because of turnover costs is linked to its unwarranted assumption that investment in long-term Government securities was the former owner's sole or preferred option. Of course, the former owner had other options, including short-term investments of a year or less whose turnover costs, if any, would be minimal and offset many times over by the dramatic rise in interest rates. The proofs showed that CNJ had in fact pursued such a program once it emerged from reorganization, earning an average yield of approximately 13% from 1979 through 1983.

The Government now proffers a thesis that "the possibility or 'risk' of higher inflation was already built into the market figure for Government securities" (Motion, 23); for, otherwise, investors would not buy this long-term paper. We are not aware of any support for that proposition; and certainly *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ *U.S.* ____, 51 U.S.L.W. 4795 (U.S. June 15, 1983), upon which the Government relies, is inapposite. It did not involve the question of compensation for past delay in payment, but rather the matter of discounting in advance an award for personal injuries to reflect the present value of a future stream of income. The estimates and projections required in the latter exercise are not involved here where the actual rates are in

fact available at the time of the delayed payment. That case, moreover, did not involve a question of just compensation under the Constitution.

Contrary to the Government's suggestion, CNJ is not urging a "one way street" - *i.e.*, saying that it could not have been awarded rates lower than 8% had there been a drop in interest rates during the delay period (Motion, 23). Had there been such a drop, we assume that the Special Court under Section 303(c) of the Rail Act would have exercised its responsibility to assure that the compensation awarded did not exceed "constitutional minimum" value and, if the investment picture warranted, reduced the interest allowed. For the same reason, the Special Court was required by Section 303(c) to allow interest at rates higher than the statutory rate which prevailed during the delay period.

Nor was the statutory provision for compounding its 8% rate a "generous" offering as the Special Court and now the Government state (Motion, 26), but rather simple recognition of compounding as a common feature of investment debt offerings. Indeed, the limitation to annual compounding is less generous than that generally available in debt securities' markets where semi-annual payment of interest is common, including interest payable on long-term Government debt. Accordingly, to deny compounding is to deny full compensation for the opportunities the former owner lost during the period of delay. Various lower federal courts which have awarded compounding have done so in recognition of this and not because, as the Special Court and the Government theorize (Motion, 25), the underlying interest rates may have been relatively low. The few courts which have rejected compounding have done so without any meaningful discussion of the question. (See J. S., 28). This Court has not yet passed upon the particular question.

3. *Severance Damages*—The Government poses the question of severance damages in the context of bridge removal costs "which were not caused by the Rail Act and would have been incurred in the absence of that Act." (Motion, (I)). Had this been the case, there would be nothing to review in this regard,

indeed, no controversy. However, uncontroverted facts show that this is not the context of the question.

As the Special Court found, rail service ceased on CNJ's Newark Bay Bridge when Conrail decided to discontinue such service. The decision to terminate service was made in the Final System Plan under the Rail Act when it was decided to exclude the CNJ bridge from the properties to be taken for continued rail service. An easement was retained for passenger service which, as the Government points out, was provided for a brief period after 1976 but discontinued in 1978. The Final System Plan contemplated rerouting all CNJ Newark Bay Bridge freight traffic over the Penn Central-Lehigh Valley Bridge to the north. The Special Court's ruling that the bridge was not put out of service as a result of the Rail Act and its implementation is, therefore, at variance with these uncontroverted facts. As noted in our Jurisdictional Statement (31), why the condemnor decided to render the bridge useless is really not relevant. The important fact is that, acting pursuant to the statute, the condemnor did so. Having exercised its statutory prerogative to sever the bridge and leave CNJ with ownership of a structure rendered useless by the serverance, the Government put CNJ in the position where, under the Bridge Act, it would have to bear the entire cost of the structure's removal as a hazard to navigation. Had the Government not caused the cessation of rail service, any mandated alteration or removal would have been governed by the Truman-Hobbs Act, 33 U.S.C. § 501, under which the Government would have had to bear nearly all, if not all, of the costs. (See J. S., 30).

We do not take issue with the Government's statement that the question of altering or removing the bridge because of alleged navigational hazards pre-dated the partial taking. The uncontroverted fact, however, is that the bridge was in rail service at the time of the taking; and it was not established that rail service over it would have been discontinued in the foreseeable future had there been no Rail Act and no partial taking. Indeed, all the evidence is to the contrary. (See J. S., 31-32).

As a result of the Rail Act and its implementation, the ruling below saddles CNJ with liability for bridge removal costs which, at the time of trial, were estimated by the Government at approximately $14,000,000.[7] The effect is to reduce the Special Court's award of approximately $42.5 million for the CNJ operating rail system to $28.5 million or less. We regard this as confiscatory by any standard and more in line with the kind of thinking evidenced in USRA's incredibly low valuations in the Final System Plan rather than with any concept of just compensation. We submit that the denial of severance damages was based on an erroneous legal concept of what facts are required to establish such damages, with resulting denial to CNJ of its constitutional right to just compensation therefor.

7. The Government has since raised its estimate to over $17,000,000. See Statement of Position of the United States of America and United States Railway Association with Respect to Petition for Supplemental Proceedings, *In the Matter of the Central Railroad Company of New Jersey*, No. B 401-67 (D.N.J. July 27, 1984) at 4-5.

CONCLUSION

These appeals present questions not previously passed upon by this Court which are of sufficient substantiality, merit and public interest to warrant plenary review at this time.

For the various reasons set forth in our Jurisdictional Statement and in this brief, this Court should deny the Government's motion for summary affirmance and note probable jurisdiction.

Respectfully submitted,

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